RECENT DECISIONS.

EDWARD W. WALKER, *Editor-in-Charge.*

ADVERSE POSSESSION—OCCUPATION OF SURFACE—TITLE TO MINERALS.—An owner conveyed the iron ore in his land to the plaintiff. The defendant thereafter acquired title to the surface, and when sued for invading the plaintiff's mine, set up possession of the surface for the period of limitation. *Held,* the defendant had acquired no title to the mine. *Morison* v. *American Ass'n* (Va. 1909) 65 S. E. 469.

Since seisin of the surface of land is normally seisin of all beneath, 2 Bl. Com. 18, a title acquired by adverse possession would normally extend to everything lying under the surface. Where, however, distinct estates in the surface and in the minerals have been created before disseisin, the usual presumption would not arise. The statute obviously would not begin to run in the possessor's favor until a right of action accrued to the owner; *Lessee of Hall* v. *Vandergrift* (Pa. 1811) 3 Binn. 374; Buswell, Limitations § 237; and it is hard to see how an owner of a mine could have a right of action against an occupant of the surface unless the latter invaded his mine or interfered with his access thereto. At any rate, if the adverse possessor of the surface has notice of the previous severance, his possession gives him no title to the mine below. *D. & H. Canal Co.* v. *Hughes* (1897) 183 Pa. 66. In the principal case, therefore, if the defendant's title to the surface arose by adverse possession commenced after the severance of estates, the decision seems correct. If, on the other hand, the surface estate was conveyed to the defendant, his possession under the deed was clearly not adverse to the owner of the substrata, *Armstrong* v. *Caldwell* (1866) 53 Pa. 284, on the principle that a deed will not give color of title beyond the estate which it purports to pass. *Enfield* v. *Day* (1835) 7 N. H. 457; Buswell, Limitations § 256.

BANKRUPTCY—EXAMINATION OF BANKRUPT—RIGHT TO EXAMINE BEFORE ADJUDICATION.—An alleged bankrupt was ordered to appear for examination at the instance of the receiver. *Held,* Buffington J. dissenting, error, as the estate was not, prior to adjudication, in process of administration, as required under Bankr. Act 1898, § 21a. *Skubinsky* v. *Bodek* (C. C. A., 3rd. C. 1909) 172 Fed. 332.

The chief aim of the Bankruptcy Act is to secure an equal distribution of the full estate of the bankrupt to his creditors, *In re Knopf* (1906) 144 Fed. 245, and where necessary to accomplish this result, the court may appoint a receiver, § 2 (3), in the interval between the filing of the petition and the appointment of a trustee, comprising the period before, §§ 18a, 18b, 19a, and after adjudication. §§ 44, 55. He does not, however, assume the powers of a trustee, *Boonville Nat. Bk.* v. *Blakey* (1901) 107 Fed. 891, but the court may authorize him to sell the property in his possession, *In re Becker* (1899) 98 Fed. 407, to sue for its recovery, *In re Fixen* (1899) 96 Fed. 748, and apparently to take such steps as the court may deem necessary for the preservation of the estate. *In re Kleinhans* (1902) 113 Fed. 107. To this end the examination of the bankrupt, by virtue of § 21a, while the estate is "in process of administration," would seem of great importance. It is objected that there is no administration until ad-

judication, whereupon the property becomes *in custodia legis, In re Crenshaw* (1907) 155 Fed. 271, but it is expressly held that property in the hands of a receiver is *in custodia legis. Whitney* v. *Wenman,* (1905) 198 U. S. 539. Moreover, under a liberal construction, to accomplish the purpose of the Act, examination of a bankrupt was ordered prior to adjudication on the ground that the property was actually in process of administration. *Re Fleischer* (1907) 151 Fed. 81. In adopting this interpretation, the dissent in the principal case seems preferable. Examination was refused in a case where no receiver had in fact been appointed, a limitation of possibly doubtful validity. *In re Davidson* (1907) 158 Fed. 678.

CONFLICT OF LAWS—PERSONS IN PRIVITY TO A FOREIGN JUDGMENT.—A judgment was given in New York in favor of a promoter in a suit by the corporation for secret profits. His associate, domiciled in Massachusetts, was not a party, and was subsequently sued by the corporation in Massachusetts. Claiming to be in privity, he set up the New York judgment in bar. *Held,* according to Massachusetts law which controls, the defendant was not in privity to the New York judgment, which, therefore, constituted no defense. *Old Dominion Copper etc. Co.* v. *Bigelow* (Mass. 1909) 89 N. E. 193.

A judgment is binding on the parties to it and their privies, Black, Judgments § 549, but a person attempting to take advantage of a judgment on the ground of privity, is of course, bound to show such privity. *Rieschick* v. *Klingelhoefer* (1902) 91 Mo. App. 430. So that when a person without the jurisdiction of the court rendering the judgment, pleads that such a judgment should be given full faith and credit in a sister state, the burden is the same, *Brown* v. *Fletcher's Estate* (1908) 210 U. S. 82, and the judgment is *prima facie* not entitled to full faith and credit. It is well recognized that a personal judgment against a non-resident without appearance or personal service of process is not entitled to full faith and credit. *Public Works* v. *Columbia College* (U. S. 1873) 17 Wall. 521. And since it is not competent for the courts to accomplish that indirectly which they cannot accomplish directly, *Clarke* v. *Clarke* (1900) 178 U. S. 186, namely to give extraterritorial effect to a personal judgment, the question of privity would seem to depend on the law of the state where such judgment is subsequently pleaded, *D'Arcy* v. *Ketchum* (U. S. 1850) 11 How. 165; *Brown* v. *Fletcher's Estate supra,* unless the law of a certain jurisdiction is to govern by force of contractual relation. *Hancock Nat. Bank* v. *Farnum* (1900) 176 U. S. 640. The conclusion of the principal case then, would seem sound.

CONSTITUTIONAL LAW—LEGISLATION—DELEGATION OF POWER.—The legislature provided that a railroad commission should, by reasonable rules and regulations, provide the time within which the carrier, at the written request of the shipper, should furnish cars, and provide the penalty per day per car to be paid by the carrier in the event the cars were not furnished within such time. *Held,* Fish C. J. dissenting, this act was constitutional as being a delegation of legislative power. *Southern Ry. Co.* v. *Melton* (Ga. 1909) 65 S. E. 665. See Notes, p. 60.

CONSTITUTIONAL LAW—POLICE POWER—DEPOSITORS' GUARANTY FUND.—A statute recently passed in Nebraska required that banking be restricted to corporations and that such corporations should pay a tax of

1% of their deposits, the proceeds to form a fund for the payment of depositors in such banks as should become insolvent. *Held,* the statute was unconstitutional. *First State Bank of Holstein* v. *Shallenberger* (C. C., D. Neb. 1909) 172 Fed. 999. See Notes, p. 55.

CONSTITUTIONAL LAW—POLICE POWER—STATE INSPECTION LAW.—A foreign corporation engaged in the manufacture and sale of illuminating oil, sought to enjoin the enforcement of a state statute, providing for the inspection of illuminating oil sold within the state, and the imposition of an inspection fee of one-half cent per gallon payable before delivery within the state. *Held,* the statute was a valid exercise of the police power. *Red C. Oil Mfg. Co.* v. *Board of Agriculture* (C. C., E. D. N. C. 1909) 172 Fed. 695.

Since a revenue tax imposed on articles while *in transitu* from one state into another is void as a regulation of interstate commerce, *Case of State Freight Tax* (1872) 15 Wall 232, the fee charged in the principal case was invalid if a revenue tax. To cover the cost of inspection, however, a state may tax imports, *Neilson* v. *Garza* (1876) 2 Woods 287, and *a fortiori* articles of interstate commerce. *Patapsco Guano Co.* v. *N. C. Board of Agriculture* (1898) 171 U. S. 345. An inspection law incidentally affecting interstate commerce is only valid if it does not discriminate against products of another state, *Brimmer* v. *Rebman* (1891) 138 U. S. 78, and if it bears some reasonable relation to the public welfare. *Railroad Co.* v. *Husen* (1877) 95 U. S. 465; *McLean* v. *Denver & Rio Grande R. Co.* (1906) 203 U. S. 38. Further, it must not impose a tax under the guise of inspection, *i. e.,* it must be a *bona fide* inspection law. *Postal Telegraph-Cable Co.* v. *Taylor* (1904) 192 U. S. 64. In determining the latter question, the amount of the charge is only pertinent when so excessive as to impute bad faith to the legislature; *McLean* v. *Denver & Rio Grande R. Co. supra; Patapsco Guano Co.* v. *N. C. Board of Agriculture supra;* and the principal case follows authority in holding that the excess shown was not sufficient to attack the good faith of the statute. *Western Union Tel. Co.* v. *New Hope* (1903) 187 U. S. 419. Illuminating oil is recognized as a proper subject of inspection. *Waters-Pierce Oil Co.* v. *Deselms* (1909) 212 U. S. 159.

CONTRACT—LIQUIDATED DAMAGES—BREACH.—The defendant agreed to discontinue the practice of medicine and pharmacy upon selling his drug store to the plaintiff, and in default thereof to pay $500. Subsequently the defendant attended two patients, and wrote eight prescriptions gratuitously. *Held,* while the sum agreed upon was liquidated damages, it could not be recovered, as there was no breach. *Brown* v. *Edsall* (S. D. 1909) 122 N. W. 658.

Whether an agreed sum payable upon breach of a contract is a penalty, or liquidated damages, is a question of the intention of the parties to be gathered from the whole instrument. *Smith* v. *Newell* (1896) 37 Fla. 147; *Magee* v. *Lavell* (1874) L. R. 9 C. P. 107. Where from the nature of the contract the amount of damage, resulting from a breach, would be uncertain and hard to determine, the agreed sum is generally regarded as liquidated damages, *Sun Printing & Pub. Ass'n* v. *Moore* (1902) 183 U. S. 642, and is the precise sum to be recovered on proof of a breach of the undertaking to which it refers, without proof of actual damage. *Kelso* v. *Reid* (1891) 145 Pa. St. 606; *Sandford* v. *First Nat. Bank* (1895) 94 Ia. 680; *contra, Hathaway* v. *Lynn* (1889) 75 Wis. 186. Where considered as liquidated damages, the

same principles of construction apply to determine what shall constitute a breach, as where the issue is whether it is a penalty or liquidated damages. *Hoagland* v. *Segur* (1876) 38 N. J. L. 230. Accordingly, the intention of the parties may be to pay only upon a total failure to perform. *Lampman* v. *Cochran* (N. Y. 1855) 19 Barb. 388. In cases like the principal case, ordinarily the object is only to prevent competition, and therefore, isolated acts are not sufficient to constitute a breach. *Greenfield* v. *Gilman* (1893) 140 N. Y. 168; *Parkhurst* v. *Brock* (1900) 72 Vt. 355; *Nelson* v. *Johnson* (1888) 38 Minn. 255.

CORPORATIONS—CRIMINAL LIABILITY OF DIRECTORS.—The directors and officers of a bank were indicted for larceny, the bank, by its failure, having lost state money deposited with it and improperly mingled with its general funds. *Held,* the directors having participated in the offense, were liable. *State* v. *Ross* (Ore. 1909) 104 Pac. 596. See Notes, p. 64.

CRIMINAL LAW—INTENT—SALE OF INTOXICATING LIQUORS.—The defendant was indicted under a prohibition law. He had sold a preparation believing it non-intoxicating, when in fact it was. *Held,* if he honestly believed it was not intoxicating, he was not guilty. *Deadweyler* v. *State* (Tex. 1909) 121 S. W. 863.

Criminal intent is a necessary element of a crime, 1 Bishop, New Criminal Law (8th ed.) § 287, but it may be eliminated by the legislature when the interests of the public imperatively demand that certain acts should be done only at the actor's peril. 7 COLUMBIA LAW REVIEW 59. Where a statute makes the sale of intoxicating liquor illegal under certain circumstances, without express reference to intent, the courts are divided as to whether it is necessary. The majority regard the absence of express reference as equivalent to an elimination of the necessity of intent, and therefore consider the illegal sale itself criminal although made in good faith under mistake of fact. *State* v. *Moulton* (1893) 52 Kan. 69; *Compton* v. *State* (1891) 95 Ala. 25. Others hold that though intent is not mentioned in the statute, the legislature did not mean to dispense with it. *State* v. *Powell* (1906) 141 N. C. 780. Accordingly, in these jurisdictions a *bona fide* mistake of fact is a good defense. *Farrell* v. *State* (1877) 32 Oh. St. 456. The principal case occurs in a state where a section of the penal code provides that if a person, laboring under a mistake of fact, does an act which would otherwise be criminal, he is guilty of no offense. Although, therefore, the liquor statute is silent as to intent, it is read in connection with such section and consequently a *bona fide* mistake of fact is a good defense. *Patrick* v. *State* (1904) 45 Tex. Crim. Rep. 587.

DAMAGES—DELAYED DELIVERY BY CARRIER—NOTICE OF SPECIAL CIRCUMSTANCES.—The plaintiff consigned machinery to himself. By delaying delivery his business was hindered. *Held,* the defendant's knowledge of the nature of the machinery was sufficient notice of its special purpose, and the plaintiff could recover more than nominal damages. *Story Lumber Co.* v. *Southern Ry. Co.* (N. C. 1909) 65 S. E. 460.

The rule of *Hadley* v. *Baxendale* (1854) 9 Exch. 341 that notice of special circumstances extends the measure of damages to such consequences as were reasonably within the contemplation of the parties as probable, is generally accepted. *Hammond* v. *Bussey* (1887) L. R. 20 Q. B. D. 79; *Booth* v. *Spuyten Duyvil R. R.* (1875) 60 N. Y. 487. The attempted limitation in the case of carriers because of the unfairness

of foisting upon them an extraordinary liability by mere notice, *Horn* v. *Midland Ry.* (1872) L. R. 7 C. P. 583, (1873) L. R. 8 C. P. 131, has not been approved, since a carrier in such cases may decline service on the usual terms. *Little* v. *Boston & Maine R. R.* (1876) 66 Me. 239. The notice, however, must be specific. *Chi. B. & Q. R. R.* v. *Hale* (1876) 83 Ill. 360; *Gee* v. *Yorkshire & Lancashire Ry.* (1860) 6 H. & N. 210. Consequently, the view that notice which puts the carrier on inquiry is sufficient seems unsound, for what one may discover by inquiry is not within his contemplation when making the contract, Sedgwick, Damages (7th ed.) 233, and as stoppage of a mill is not considered a contemplated probable result of delay in delivering goods to a mill, *Cooper* v. *Young* (1857) 22 Ga. 269; *Thomas Mfg. Co.* v. *Wabash R. R.* (1885) 62 Wis. 642, the principal case is not representative, though sound in its jurisdiction. *Furniture Co.* v. *Express Co.* (1908) 148 N. C. 87. Where notice is proved, damages which are certain are recoverable, *British Columbia S. N. Co.* v. *Nettleship* (1868) L. R. 3 C. P. 499; *Rocky Mountain Mills Co.* v. *R. R.* (1896) 119 N. C. 693, and therefore profits, though usually excluded because too speculative, *Brigham* v. *Carlisle* (1884) 78 Ala. 243, should be included when definitely ascertainable. 3 COLUMBIA LAW REVIEW 198; *Griffin* v. *Colver* (1858) 16 N. Y. 489.

EASEMENTS—EXCESSIVE USER—BENEFIT TO NON-APPURTENANT ESTATE. —The owners of land, enjoying under a grant, an appurtenant easement in a switch, as an outlet for business, erected boilers on the dominant estate, supplying steam to a power house situated on adjacent land. *Held,* the use of the switch to supply the boilers with coal was excessive. *Goodwillie Co.* v. *Comw. Elec. Co.* (Ill. 1909) 89 N. E. 272.

Where an easement arises from a grant, the terms of the instrument may imply the continuance of a substantially similar dominant estate, *Allen* v. *Gomme* (1840) 11 A. & E. 759, or may be regarded as conferring a general easement under which a subsequent change in the dominant estate is permitted, although it increases the burden on the servient estate. *Arnold* v. *Fee* (1896) 148 N. Y. 214. In either event, however, where the easement is appurtenant, as in the principal case, the user must be for the benefit of the dominant estate. *Howell* v. *King* (1674) 1 Mod. 190; *Brightman* v. *Chapin* (1885) 15 R. I. 166. That such user incidentally redounds to the benefit of other property does not constitute it a trespass. *Simpson* v. *Godmanchester* L. R. [1897] App. C. 696. But frequently it becomes a question for a jury whether the benefit to the dominant estate is merely colourable, and the easement in reality subservient to other lands. *Skull* v. *Glenister* (1864) 16 C. B. [N. S.] 81. The user of a way appurtenant to directly benefit other premises, is excessive. *Dand* v. *Kingscote* (1840) 6 M. & W. 173. The same result obtains where the dominant estate becomes an integral part of a larger estate, for in such case, although the benefit to the non-appurtenant premises is not physical, it is, nevertheless, direct. *McCulloch* v. *Broad Exch. Co.* (N. Y. 1905) 101 App. Div. 566; aff'd (1906) 184 N. Y. 592. The principal case falls within this doctrine.

EQUITY—CONTRIBUTION—ALL JOINT DEBTORS INSOLVENT OR NON-RESIDENT.—A judgment was obtained against the plaintiff and eighteen others on a joint obligation which was paid by the plaintiff and another. All the other parties were either insolvent or non-resident. The plaintiff brought a suit in equity for contribution. *Held,* a judg-

ment for one-third of the total debt should be entered against each defendant served, the first one able to pay becoming liable thereunder. In such event one-fourth should be collected against the next defendant becoming able to pay, and so on, until the debt is borne equally by all who can pay. *Jewett* v. *Maytham* (1909) 118 N. Y. Supp. 635.

Originally equity had exclusive jurisdiction over the subject of contribution between persons responsible for the same debt. *Couch* v. *Terry's Adm'rs* (1847) 12 Ala. 225, 228. Later a remedy was allowed at law, but equity still continues to give relief, *Walker* v. *Cheever* (1857) 35 N. H. 339, 349, particularly as multiplicity of suits is often avoided thereby. *Hoyt* v. *Tuthill* (N. Y. 1884) 33 Hun 196. At law only an *aliquot* part of the whole can be recovered, regard being had to the total number of debtors. *Cowell* v. *Edwards* (1800) 2 Bos. & Pul. 268. But in equity, on the principle that "equality is equity," the burden is divided equally among those able to pay; *Breckenridge* v. *Taylor* (Ky. 1837) 5 Dana 110; and accordingly parties who are insolvent, *Gross* v. *Davis* (1888) 87 Tenn. 226, or non-resident, *Bosley* v. *Taylor* (Ky. 1837) 5 Dana 158, do not enter into the computation. While generally insolvent or non-resident parties need not be joined in the bill, *Byers* v. *McClanahan Jr.* (Md. 1834) 6 Gill. & Johns. 250, 258; *Jones* v. *Blanton* (N. C. 1848) 6 Ired. Eq. 115, where they are joined and served, a remedy may be decreed against them to be enforced if they afterward become able to pay. *Easterly* v. *Barber* (1876) 66 N. Y. 433, 439; *Kimball* v. *Williams* (N. Y. 1900) 51 App. Div. 616. While no case appears in which all the defendant obligors are either insolvent or non-resident, since the equitable principle is to distribute the burden equally among those able to bear it, *Breckinridge* v. *Taylor supra,* and since a decree may bind parties who later become able to pay if they have been served, *Kimball* v. *Williams supra,* the principal case, although novel, appears correct.

EQUITY—UNILATERAL MISTAKE OF FACT—REFORMATION AND RESCISSION. —A contracted to sell a plot of land to B. By the fraud of B the deed passed a larger amount than was intended. *Held,* A was entitled to a reformation of the deed. *Gray* v. *James et al.* (N. C. 1909) 65 S. E. 644.

The practice of Equity to reform or cancel an instrument for mutual mistake of fact has not been generally extended to cases of unilateral error, as it would open the door to fraud. *Brainerd* v. *Arnold et al.* (1858) 27 Conn. 617; *Herron* v. *Mullen* (1898) 56 N. J. Eq. 839. To justify interference it must be shown that the defendant has knowingly taken an unconscionable advantage of the plaintiff's mistake, *Gun* v. *McCarthy* (1883) L. R. Ireland 13 Ch. D. 304, or that he has practiced a positive fraud upon the plaintiff. *Kilmer* v. *Smith et al.* (1879) 77 N. Y. 226. Equity has even lent aid when, without knowledge of any mistake a party has received a value he did not expect to receive and cannot justly retain. *Brown* v. *Lamphear* (1862) 35 Vt. 252. A donee of a deed cannot get relief against his donor, *Eaton* v. *Eaton et al.* (1862) 15 Wis. 259, but in some jurisdictions he may against the personal representatives of the donor. *M'Mechan* v. *Warburton* (1894) L. R. Ireland 1 Ch. D. 435. A donor of a deed, on the other hand, may get relief for any excess granted by mistake. *Andrews* v. *Andrews* (1859) 12 Ind 348; *Day* v. *Day* (1881) 84 N. C. 408. As to the form of relief, Equity can only decree a cancellation of the instrument when the mistake arises in the executory contract, as there is no pre-existing contract upon which a reforma-

tion can be predicated. *Gun* v. *McCarthy supra.* Some jurisdictions, when the terms of the executory contract are settled and the mistake arises in the deed executing the agreement, have decreed a rescission or reformation at the option of the defendant, *Garrard* v. *Frankel* (1862) 30 Beav. 445; *Harris* v. *Pepperell* (1867) L. R. 5 Eq. 1, or as in the principal case, have allowed a reformation merely, without any election by the defendant. *Welles* v. *Yates* (1871) 44 N. Y. 525.

ESTOPPEL—MUTUALITY OF EQUITABLE ESTOPPEL.—The plaintiff sued for breach of contract to keep certain streets in repair. The defendant had been paid in full, but the assessment for the work was raised in an illegal manner. *Held,* the defendant was estopped from setting up the invalidity of the contract, since the city would be similarly estopped if suit had been brought against it. *City of Akron* v. *Barber Asphalt Paving Co.* (C. C. A., 6th. C. 1909) 171 Fed. 29.

Legal estoppels are of three kinds: estoppel by deed, estoppel by record, and estoppel by matter *in pais,* which includes livery, entry, acceptance of rent, partition, and acceptance of estate. *Co. Litt.* § 352a. They depend on strict legal rules and shut out the proof of the truth and justice of the individual case. *Horn* v. *Cole* (1868) 51 N. H. 287. They always bind both parties or neither. *Edmondson* v. *Montague* (1848) 14 Ala. 370. Equitable estoppels *in pais,* on the other hand, though incorporated into law, are altogether of a different nature, 2 Pomeroy, Eq. Jur. § 802, and are admitted to promote the equity and justice of the individual case. *Horn.* v. *Cole supra.* They are based on conduct, and their purpose is to prevent a party from denying the truth of his representation when it would be contrary to good conscience for him to do so. *Elec. Light Co.* v. *Gas Co.* (1897) 99 Tenn. 371, 381. The underlying principles of equitable estoppel, therefore, would seem to preclude an estoppel from arising merely by the application of the doctrine of mutuality, for an equitable estoppel is never made out except in cases where, in honest dealing, a party should not be allowed to gainsay his acts. *Edmonson* v. *Montague supra* at 377. While there may be other elements in the principal case sufficient to estop the defendant, the apparent ground of the decision, *i. e.* mutuality of estoppel, does not appear well taken.

EVIDENCE—WRITTEN CONTRACTS—VARIATION BY PAROL.—In an action against the maker on a due-bill for payment of a specified sum, the defendant, without alleging fraud or mistake, offered parol evidence that the agreement actually made by him was to pay a smaller sum and surrender an old insurance policy. *Held,* two judges dissenting, the evidence was inadmissible. *Woodson* v. *Beck* (N. C. 1909) 65 S. E. 751.

Wherever parol evidence is offered to vary the effect of a written contract, the test of admissibility seems to be, whether the writing appears to contain the whole consensus of the parties as to the particular subject of the alleged parol stipulation. *Eighmie* v. *Taylor* (1885) 98 N. Y. 288. Hence, if the contract is complete on its face, a collateral agreement may be shown by parol, only if its subject-matter is distinct from, and not inconsistent with, the terms of the instrument. *Naumberg* v. *Young* (1882) 44 N. J. L. 331; *Eighmie* v. *Taylor supra.* Thus, where a furnished house is leased, evidence of a parol promise to supply more furniture is inadmissible. *Angell* v. *Duke* (1875) 35 L. T. R. [N. S.] 320; *cf. Morgan* v. *Griffith* (1871) L. R. 6 Exch. 70. Where the writing does not purport to embody the whole

transaction, parol evidence is admissible to round out the agreement, *Allen* v. *Pink* (1838) 4 M. & W. 140; *Cobb* v. *Wallace* (Tenn. 1868) 5 Coldw. 539, but not to enlarge any term with which the writing deals in apparent completeness. *Clark* v. *Hart* (1873) 49 Ala. 86; *Dudley* v. *Vose* (1873) 114 Mass. 34. In the principal case, it may be argued that the evidence offered would, if properly pleaded, have been admissible as tending to show a collateral or supplementary agreement regarding the method of payment. *Kerchner* v. *McRae* (1879) 80 N. C. 219; *Evans* v. *Freeman* (1906) 142 N. C. 61. This seems to conflict, however, with the rule excluding evidence to vary an apparently complete term of payment. *Clark* v. *Hart supra.* As the defense pleaded was that the writing was in fact no part of the actual agreement, the decision is clearly right.

FIRE INSURANCE—LOSS BY FIRE—FIRE DEFINED.—A servant built a fire in a furnace, out of highly inflammable material not intended to be used therein. No ignition occurred outside of the furnace but intense heat and smoke escaping into the house charred and injured the furnishings. *Held,* Marshall J. dissenting, the damage was covered by the fire insurance policy. *O'Connor* v. *Queens Ins. Co.* (Wis. 1909) 112 N. W. 1038, 1122. See Notes, p. 58.

MANDAMUS—EMINENT DOMAIN—WRIT OF POSSESSION COMPELLED.—Upon verdict in eminent domain proceedings, the court was required by statute to order that petitioner enter upon the property upon the payment of full compensation. The relator, after order issued, paid the amount assessed and being opposed by the landowners, applied for an order directing the sheriff to put him in possession, which was denied. *Held,* two judges dissenting, mandamus would issue to compel the granting of such order. *People* v. *District Court* (Colo. 1909) 104 Pac. 484.

The order applied for is in the nature of a writ of assistance which, at common law, issued as of right to enforce a judgment in ejectment. *Doe d. Lucy* v. *Bennett* (1825) 4 B. & C. 897. In the absence of express statutory provision, however, such order is not proper after judgment in condemnation proceedings, *Niagara Falls & L. O. R. R. Co.* v. *Hotchkiss* (N. Y. 1853) 16 Barb. 270, because in this case title is acquired not by judgment of the court but by virtue of the statute containing the delegation of the sovereign power. *Indianapolis & S. L. R. R. Co.* v. *Smythe* (1873) 45 Ind. 322. Even if the statute in question may be construed as authorizing the writ, the wrong remedy has been adopted to secure it. Mandamus issues only when the act sought to be enforced is purely ministerial, 5 COLUMBIA LAW REVIEW 160, and the relator has no other adequate remedy. *State* v. *McAuliffe* (1871) 48 Mo. 112. Mandamus will not lie where there is a remedy by appeal. *People* v. *Clerk* (1896) 22 Colo. 280. An appeal lies from an order denying an application for a writ of possession. *Baker* v. *Pierson* (1858) 5 Mich. 456. It has been intimated that where the relator's right is clear and an appeal is inadequate because of peculiar circumstances, mandamus will issue. *State* v. *Burnell* (1899) 104 Wis. 246. Such a result would appear doubtful as, it is submitted, the grant of the writ is not a ministerial act. *Baker* v. *Pierson supra; Aldrich* v. *Circuit Judge* (1897) 111 Mich. 525, 527. The better practice is for the aggrieved party to appeal. *Aldrich* v. *Circuit Judge supra;* see *Chicago & N. W. R. Co.* v. *Chicago* (1894) 148 Ill. 141.

NEW TRIAL—SUSPENSION OF ATTORNEY FOR CONTEMPT—PREJUDICE TO CLIENT.—The plaintiff assigned as error, that while defendant in a criminal action, his attorney was suspended for several hours for contempt of court. *Held,* the proper course would have been to defer the punishment for contempt until the close of the trial, but since as a matter of fact the plaintiff's rights had not been injuriously effected, the assignment was unavailable. *Charles* v. *State* (Fla. 1909) 50 So. 419.

Since contempt proceedings are *quasi* criminal in nature, a client cannot be punished for contempt committed by his attorney without his knowledge or direction. *Satterlee* v. *De Comeau* (N. Y. 1868) 7 Rob. Pr. 666. By the punishment of the attorney, however, the client may be indirectly affected, and while prejudice to a party's rights may be ground for a new trial, such prejudice on the jury as might result from fining a witness is so trifling as to be insufficient. *Wright* v. *State* (1904) 47 Tex. Cr. R. 433. This result is explainable on the ground that it is essential to the very existence of a court to punish contempts, *State* v. *Woodfin* (N. C. 1844) 5 Ired. L. 199, and if need be in a summary manner when committed in the presence of the court. *Ex parte Terry* (1888) 128 U. S. 289. The exercise of such a power, therefore, should not be restricted except in clear cases. The fining of an attorney is obviously governed by the same principles. But if an attorney, in prison for contempt, is ordered while under arrest to argue for his client, this is regarded as a wanton trifling with the defendant's rights sufficient to grant a new trial. *Robertson* v. *State* (1873) 38 Tex. 187. Ordinarily, if an attorney is imprisoned or suspended for contempt, since the client may have a stay to secure counsel, *Coon* v. *Plymouth Plank Rd. Co.* (1875) 32 Mich. 248, there is no ground for a new trial any more than when a fine is imposed. While the court in its discretion might defer the infliction of punishment until the close of the trial, to lay this down as the general rule for all cases would seem unwise.

OFFICES—INCOMPATIBLE OFFICES.—The mayor of a town was elected federal congressman, and accepted the position. *Held,* the first office was retained as the two offices were compatible. *State* v. *Gebert* (Oh. Cir. Ct. 1909) 54 Oh. Law Bull. No. 48. See Notes, p. 67.

PATENTS—TERM—PRIOR FOREIGN PATENT.—§ 4887 U. S. R. S., before its amendment in 1897, provided that a domestic patent should expire at the same time as a prior foreign patent for the same invention. After the grant to the plaintiff of a domestic patent, his prior foreign patent was adjudged void *ab inito. Held,* Buffington J. dissenting, the domestic patent was not limited by § 4887. *Hennebique Const. Co.* v. *Myers* (C. C. A., 3rd. C. 1909) 172 Fed. 869.

When an invention is covered by a prior foreign patent, the term of the American patent is the original term of the foreign patent, as it appears on its face when the former is issued, *Victor Talk. Mach. Co.* v. *Talk-O-Phone Co.* (1906) 146 Fed. 534, and is unaffected by a subsequent extension, *Henry* v. *Prov. Tool Co.* (1878) Fed. Cas. No. 6384, or by a lapse or forfeiture of the foreign patent through the operation of a condition subsequent. *Pohl* v. *Anchor Brewing Co.* (1890) 134 U. S. 381; *Leeds & Catlin Co.* v. *Victor Talk. Mach. Co.* (1909) 213 U. S. 201. In this class of cases, the section in question has been construed as granting a monopoly for a predetermined period of years

without reference to incidents occurring after the grant. *Paillard* v. *Bruno* (1886) 29 Fed. 864; *Henry* v. *Prov. Tool. Co. supra.* While, in the light of this construction, there is force in the contention of the dissenting opinion of the principal case that the operation of the rule favored by the majority renders the duration of an American patent undesirably indefinite, it is to be noted that in the cases above cited the original validity of the foreign patent was never questioned. The rule is also open to the objection that it puts a premium upon collusive suits abroad brought to extend the life of a domestic monopoly. See *Bate Refrig. Co.* v. *Gillett* (1887) 31 Fed. 809. The better view, however, seems to be that Congress did not intend to restrict the privilege of the American patentee when his foreign patent as a legal monopoly has never in fact had any existence. The only prior decision on the question is in accord with the principal case. *Bate Refrig. Co.* v. *Gillett* (1884) 20 Fed. 192.

PERSONS—PUTATIVE WIFE—COMMUNITY PROPERTY.—The plaintiff married in ignorance of her husband's prior existing marriage, and lived in ignorance of such fact until his death. She sued in behalf of herself and her husband's child for injuries to her husband not resulting in his death, due to the defendants' negligence. *Held,* Dunklin J. dissenting, the action could be maintained, as the plaintiff was entitled to the rights of a lawful wife. *Ft. Worth & R. G. Ry. Co.* v. *Robertson* (Tex. 1909) 121 S. W. 202.

In Texas, upon the death of the husband, one half of the community property passes to the heirs and the other half to the wife. *Johnson* v. *Harrison* (1877) 48 Tex. 257; *Stone* v. *Ellis* (1887) 69 Tex. 325. Since all property of the parties except that acquired by gift, bequest, devise, or descent is community property, *Schuyler* v. *Broughton* (1886) 70 Cal. 282, a cause of action for injuries to the person of either spouse is community property, *Ezell* v. *Dodson* (1883) 6 Tex. 331, and such chose in action is suable by that member of the community who has the disposition of the community property. *Hawkins* v. *Front St. Cable R. Co.* (1892) 3 Wash. 592. If the plaintiff in the principal case were the lawful wife, therefore, there would seem to be no question that the suit was properly brought. By the common law, if a person having a living spouse marry again, such second marriage is absolutely null and void. *Riddleston* v. *Wogan* (1601) Cro. Eliz. 858. Since the marriage is void, the children are illegitimate, *Zule* v. *Zule* (N. J. 1830) 1 Sax. 96, and the parties have no interest in the property of each other. *Higgins* v. *Breen* (1845) 9 Mo. 497; *Sellers* v. *Davis* (Tenn. 1833) 4 Yerg. 503. By the civil law of Spain upon which the law of Texas is based, the innocent party to such second marriage contracted in *bona fide* ignorance of any existing marriage, is entitled to all the rights of a husband or wife while in such ignorance, *Lee* v. *Smith* (1856) 18 Tex. 141, and children begotten while such ignorance exists are legitimate. *Gaines* v. *New Orleans* (U. S. 1867) 6 Wall 642. The principal case, therefore, is correct.

REAL PROPERTY—FUTURE ESTATES—VESTED REMAINDERS IN NEW YORK. —A by will gave all his property to his wife for life, then all the remainder after her death to his children *then* living with a substitution clause in favor of the issue of any deceased child. B, a child, both assigned his interest to the plaintiff and died during the life of the wife. An action was subsequently brought to partition the property of the testator. *Held,* the plaintiff had no interest sufficient to maintain the action. *Wright* v. *Wright* (1909) 118 N. Y. Supp. 994.

Under § 13 (1 R. S. p. 723; R. P. L. § 30) an estate is vested when there is a person in being who would have an immediate right to possession upon the ceasing of the precedent estate, and a deed conveying land to X for life and after his death to his heirs vests a remainder immediately in the children of X. *Moore* v. *Littel* (1869) 41 N. Y. 66; *House* v. *Jackson* (1872) 50 N. Y. 161. The case of *Hennessey* v. *Patterson* (1881) 85 N. Y. 91 threw some doubt on *Moore* v. *Littel*, but did not overrule it, Fowler, Real Property (2nd ed.) 224, nor did *Matter of Wilcox* (1909) 194 N. Y. 288 affect it. Reeves, Real Property 1156; but see 9 COLUMBIA LAW REVIEW 701. Under language practically similar to that used in the principal case, remainders without a substitution clause have been held vested. *Connelly* v. *O'Brien et al* (1901) 166 N. Y. 406. The addition of a substitution clause does not affect the quality of a remainder otherwise vested. *Hopkins* v. *Hopkins* (N. Y. 1874) 1 Hun. 352. Such remainders, although liable to be divested by the death of the remainderman during the particular estate, are alienable, *Lawrence* v. *Bayard* (N. Y. 1838) 7 Paige Ch. 70, but the grantee takes them subject to the condition subsequent *i. e.* the death of the grantor before the death of the life tenant. *Sheridan* v. *House* (N. Y. 1868) 4 Abb. Ct. App. Dec. 218. This, it is submitted, is the true theory for obtaining the result reached in the principal case, the reasoning of which appears somewhat confused.

REAL PROPERTY—WILLS—RULE IN SHELLEY'S CASE.—The testator devised certain lands to his son for life and after his death to his heirs. The will further provided that the devisee should have no power to convey the property for a longer period than his own life. *Held,* the devisor's intent that the rule in Shelley's Case should not operate, must prevail. *Westcott* v. *Meeker* (Ia. 1909) 122 N. W. 964. See Notes, p. 62.

RECEIVERS—DISTRIBUTION OF ASSETS—PREFERRED CREDITORS.—The creditors of an insolvent fuel corporation placed its business in the hands of a trustee who was to continue the same one year for their benefit. In the course of its management debts were incurred. A receiver was later appointed. *Held,* in the distribution of assets the new creditors had a lien prior to that of the original creditors. *Davis* v. *Iowa Fuel Co.* (Ia. 1909) 122 N. W. 815.

On grounds of policy, when railroad property has been placed in the hands of a receiver, liens for subsequent operating expenses are regarded as prior to those of existing mortgages. 7 COLUMBIA LAW REVIEW 627. In the case of private corporations when considerations of probable loss or gain to the creditors are present, the courts have authorized a receiver to maintain the business as a going concern and contract debts which shall be given priority. For instance, a completion of a canal upon which valuable land grants depended has been authorized, *Kent* v. *Lake Superior Canal Co.* (1892) 144 U. S. 75, likewise, the completion of unfinished ships of a shipbuilding company. *Appeal of Neafie* (Pa. 1888) 12 Atl. Rep. 271. In these latter cases the consent of all the creditors to a continuation of the enterprise is essential. *Farmers' L. & T. Co.* v. *Grape Creek Coal Co.* (1892) 50 Fed. 481. The situation in the principal case is analogous, for the creditors did so consent, and the fact that the trustee in charge of the business was their own creature and not an officer of the court is immaterial. Assuming that this analogy is not applicable and that the corporation and not the trustee is the debtor, the claims in ques-

tion were for aid furnished an embarrassed corporation before the appointment of a receiver, with the express consent of all the creditors, and under such conditions also, these claims would have priority. See *Farmers' L. & T. Co.* v. *Bank & Mer. Tel. Co.* (1896) 148 N. Y. 315.

SALES—PAYMENT BY INSTALLMENTS—PASSING OF TITLE.—A contract for the construction of a vessel provided for payment of the purchase price in installments at agreed stages of the work, the parts as paid for to become the sole property of the vendee, who, however, reserved the right to reject the vessel before final acceptance upon breach of any term by the vendor. *Held,* two judges dissenting, the vendee acquired no title to the vessel before its completion. *S. H. Hawes & Co.* v. *Wm. R. Trigg Co.* (Va. 1909) 65 S. E. 538.

The intention of the parties is the criterion in deciding when title has passed. *Martineau* v. *Kitching* (1872) L. R. 7 Q. B. 436. Under a contract for the building of a chattel not *in esse,* in the absence of express stipulation, a rule of construction has been adopted, based upon the reasonably presumable intention, that the property remains in the builder until completion. *Briggs* v. *A Light Boat* (Mass. 1863) 7 Allen 287; *Clarkson* v. *Stevens* (1882) 106 U. S. 505. Generally in this country mere evidence of payment by installments, and supervision of the work by the vendee is not sufficient to rebut this presumption. *Andrews* v. *Durant* (1854) 11 N. Y. 35; *contra, Sanford* v. *Wiggins Ferry Co.* (1867) 27 Ind. 522. The English rule is *contra. Clark* v. *Spence* (1836) 4 Adol. & E. 448; but see *Sir James Laing & Sons* v. *Barclay, Curle & Co.* L. R. [1908] A. C. 35. It is always competent, however, for the parties expressly to agree when title shall pass. In this case the expressed intention is controlling. *Elliott* v. *Edwards* (1871) 35 N. J. L. 265; *Hatch* v. *Oil Co.* (1879) 100 U. S. 124. Since the contract in the principal case clearly provides that the title shall pass as payments are made, it is difficult to see why that expressed intention is not effectuated. The chief contention of the majority, moreover, that a reservation of the right to reject is inconsistent with the idea of title passing, is contrary to well settled principles governing sales on condition subsequent. *The Poconoket* (1895) 67 Fed. 262; *Boothby* v. *Plaisted* (1871) 51 N. H. 436. The decision is erroneous.

SALES—STANDING TIMBER—GOODS OR INTEREST IN LAND.—The plaintiff brought trover for the conversion of standing trees bought by parol contract under which the purchase price was paid. The plaintiff contended his title was sufficient to maintain the action, as such contract was one for the sale of goods. *Held,* the transaction was *prima facie* a sale of an interest in land. *Hurley* v. *Hurley* (Va. 1909) 65 S. E. 472.

On the ground that standing trees are attached to the soil and would pass to the heir, many jurisdictions regard a contract for their sale as one for the sale of an interest in land, whether the severance is to take place within a definite time, *Green* v. *Armstrong* (N. Y. 1845) 1 Denio 550; *Howe* v. *Batchalder* (1870) 49 N. H. 204, an indefinite time, *Buck* v. *Pickwell* (1854) 27 Vt. 157; *Miller* v. *Zufall* (1886) 113 Pa. St. 317, or at once. *Hirth* v. *Graham* (1893) 50 Oh. St. 57. In England, on the other hand, if it appears that the trees are to gain no further benefit from the soil, the contract is for the sale of goods. *Marshall* v. *Green* (1875) L. R. 1 C. P. D. 35. Some jurisdictions in this country are in accord with this view, considering a constructive severance to have taken place. *Byasse* v. *Reese* (Ky. 1863) 4 Met. 372; *Banton* v.

Shorey (1885) 77 Me. 48. In deciding whether a contract is for the sale of goods, or one for material and labor, the better rule seems to be, that if the parties intended that the contract when completed should pass title to a chattel it is a contract for the sale of goods. *Lee* v. *Griffin* (1861) 1 B. & S. 272; Burdick, Law of Sales (2nd ed.) § 36. It is submitted that the same test should be applied to determine whether a contract for the sale of standing trees is one for an interest in land, or for the sale of goods; and this test is applied in some jurisdictions. *White* v. *Foster* (1869) 102 Mass. 375; *Smith* v. *Bryan* (1853) 5 Md. 141. The decision in the principal case, while not without support, lays down a less desirable rule.

TORTS—PERJURY—CIVIL LIABILITY.—The defendant gave perjured testimony in a case in which the plaintiff was a party and in which the decision was adverse to the latter. *Held,* the defendant was not liable in tort. *Godette* v. *Gaskill* (N. C. 1909) 65 S. E. 612.

It is generally declared that a litigant injured by the perjury of a witness has no remedy against him in tort. *Cunningham* v. *Brown* (1846) 18 Vt. 123. The chief considerations leading to the adoption of this rule were the absence of precedent allowing such an action, *Davenport* v. *Sympson* (1595) Cro. Eliz. 520, and the fact that the proceedings of the jury would have to be brought into question with the result that virtually a new trial of the former suit would be necessary. *Smith* v. *Lewis* (N. Y. 1808) 3 Johns. Super. Ct. Rep. 157. The first reason alone is not sufficient, *Kujek* v. *Goldman* (1896) 150 N. Y. 176, 178, but the latter seems well taken, as it would multiply and extend litigation. In certain cases perjury constitutes a civil contempt, as for instance where a judgment debtor refuses to testify truthfully under a court order. *In re Rosenberg* (1895) 90 Wis. 581. In such event, since the plaintiff may have relief by the imprisonment of the witness to enforce compliance with the order, there is no obstacle to granting relief. Also where it is clear that the perjury actually caused definite pecuniary loss, as where a surety makes a false affidavit in regard to his responsibility, *Eagan* v. *Lynch* (N. Y. 1883) 49 Super. Ct. 454; *Lawrence* v. *Harrington* (N. Y. 1892) 63 Hun. 195, indemnification is properly allowed. In establishing this causal relation under the circumstances of the principal case, however, the effect of the testimony on the judgment must be ascertained, a result which is impossible without a virtual new trial. Since this is a fatal objection to an action on the case, *Smith* v. *Lewis supra,* it would seem to apply with equal force to an action for civil contempt. It would appear, therefore, that the defendant is liable to indictment only.

WATERS AND WATERCOURSES—BOUNDARIES—THREAD OF A LAKE.—Action for trespass. The parties owned adjoining land bounded on one side by a lake which had neither outlet nor inlet. *Held,* each abutting owner was entitled to the land under water in front of his premises to the thread of the lake, which passed through the center of the lake along its longest diameter. *Calkins* v. *Hart* (1909) 118 N. Y. Supp. 1049.

The main object of the division of water beds subject to private ownership between co-terminus owners of the shore, is to secure for each owner an equitable and proportionate share of the bed. *Nott* v. *Thayer* (N. Y. 1857) 2 Bosw. 10. This principle applies alike to submerged and alluvian lands. *O'Donnell* v. *Kelsey* (1852) 10 N. Y. 412. Therefore, ordinarily, the direction of the side lines which bound the upland is given no effect. *Benne* v. *Miller* (1898) 149 Mo. 228.

Where the shore line of the sea, or of a stream, is irregular, such result is obtained by establishing an exterior line or base, and dividing it proportionately to the divisions on the shore, connecting the respective points by straight lines. *Rust* v. *Boston Mill Corporation* (Mass. 1828) 6 Pick. 158; *O'Donnell* v. *Kelsey supra; Batchelder* v. *Keniston* (1872) 51 N. H. 496. Where the shore line of the sea is regular, an exterior line in the general course of the shore is established, and the side lines of the upland lots are extended to it at right angles with the shore line, *Sparhawk* v. *Bullard* (Mass. 1840) 1 Metc. 95, and in the case of a stream with regular banks the division lines are extended into the stream at right angles to its thread. *Bay City Gas Light Co.* v. *Industrial Works* (1873) 28 Mich. 182. This rule has been extended to small lakes where the length greatly exceeds the width. *Ledyard* v. *Ten Eyck* (N. Y. 1862) 36 Barb. 102. However, the courts have refused to lay down a general rule applicable to all lakes, *Pittsburg & L. A. Iron Co.* v. *Lake Superior Iron Co.* (1898) 118 Mich. 109; *Stoner* v. *Rice, Auditor* (1889) 121 Ind. 51, and differing circumstances have given rise to different rules. *Hardin* v. *Jordan* (1890) 140 U. S. 371; *Scheifert* v. *Briegel* (1903) 90 Minn. 125. Since the end of such division is an equitable apportionment, an inflexible rule like that laid down in the principal case is of doubtful expediency.

WATERS AND WATERCOURSES—NATURAL WANTS—INJUNCTION.—As the result of a dam constructed across a river by the defendant to make a fishing pond, the flow of water was insufficient for the natural wants of the orators, who brought a bill on the ground that the defendant's use was unreasonable. *Held,* the defendant's use was unreasonable, in view of the reciprocal rights of the other riparian owners. *Lawrie* v. *Silsby* (Vt. 1909) 74 Atl. 94. See Notes, p. 65.

WILLS—UNDUE INFLUENCE—BURDEN OF PROOF.—The contestant of a will appealed from the probate on the ground that evidence to show undue influence was rejected. *Held,* although such evidence was admissible, the burden was on the contestant to prove such influence. *In re Loree's Estate* (Mich. 1909) 122 N. W. 623.

According to the general rule, the burden of proving undue influence is on the contestant, *Michael* v. *Marshall* (1903) 201 Ill. 70, but it would seem that on theory, since the proponent attempts to break the descent, the burden is upon him to establish that the will was executed with the formalities required by law, and by a testator possessing a sound and disposing mind. *Delafield* v. *Parish* (1862) 25 N. Y. 9. The better view therefore places the burden of proving capacity on the proponent, *Robinson* v. *Adams* (1874) 62 Me. 369, although but slight evidence is required to make out a *prima facie* case. *Spratt* v. *Spratt* (1889) 76 Mich. 384. For the same reason he must likewise establish the free agency of the testator as essential to the validity of the will. *Barry* v. *Butlin* (1838) 2 Moore P. C. 480. The cases, therefore, would seem to lose sight of sound principle in putting the onus on the contestant, seeing that the will cannot be the will of the testator, unless he was a free agent. *Sheehan* v. *Kearney* (Miss. 1896) 35 L. R. A. 102. Although in some instances the burden may be construed narrowly as the duty of going forward with the evidence, *Bulger* v. *Ross* (1892) 98 Ala. 267, the misapprehension is explicable perhaps in that the courts treat the contest on the ground of undue influence as a distinct proceeding, *Estate of Latour* (1903) 140 Cal. 414, the free agency of the testator being presumed by the probate. See *Boyse* v. *Rossborough* (1856) 6 H. L. Cas. 2, 49.